IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. QUINCY VALENTINO HAWKINS, Appellant.	No. 38011-1-II UNPUBLISHED OPINION

Armstrong, J. — Quincy Valentino Hawkins appeals his convictions for second degree murder while armed with a firearm, second degree assault while armed with a firearm, and first degree unlawful possession of a firearm. Hawkins argues that he was denied effective assistance of counsel when his attorney failed (1) to fully cross-examine the medical examiner as to the cause of death and (2) reasonably investigate his client's best defense. Hawkins further maintains that the trial court miscalculated his offender score by not treating his prior crimes of burglary and custodial interference as the same criminal conduct rather than two distinct crimes. We find no error and, thus, affirm.

FACTS

On September 29, 2007, Quincy Valentino Hawkins showed up at his former girlfriend Lashae Levingston's house uninvited to take care of their daughter. As Levingston and Hawkins

stood outside arguing, Levingston's current boyfriend, Dowell Thorn, arrived with his half-brother, Michael Chelly. Levingston took her daughter inside the house and Hawkins approached Thorn. The two men wrestled for control over a gun.[1] The gun went off several times during the altercation, hitting Chelly in the leg and Thorn in the abdomen. Hawkins left the scene in his car. Thorn gave chase, but was found several blocks away slumped over the steering wheel of his car. He was later pronounced dead at Tacoma General Hospital. Police arrested Hawkins several weeks later in Chicago.

The State charged Hawkins with second degree murder of Thorn while armed with a firearm, first degree assault of Michael Chelly while armed with a firearm, and first degree unlawful possession of a firearm.

Before trial, Hawkins sought to dismiss his attorney, claiming that counsel was not properly investigating the case. Defense counsel assured the court that he had obtained a statement from a witness crucial to Hawkins's claim of self-defense and had subpoenaed the witness.[2] The judge denied Hawkins's request. Although the opening statements were not transcribed, it appears defense counsel proffered a theory of self-defense.

At trial, the medical examiner testified that Thorn died from a gunshot wound to the abdomen. On cross-examination, defense counsel asked only one question: whether the injury was consistent with two people struggling over a firearm.

Levingston's testimony was inconsistent and contradictory. Both sides impeached her on

[1] The evidence is conflicting as to who brought the gun to the fight.

[2] Although not explicitly stated at this hearing, it appears the witness referred to was Levingston.

several issues, including whether Thorn owned or possessed a gun, and whether she saw it in his possession on the day in question.

At the end of the State's case, defense counsel asked the court's permission to review the record of Levingston's testimony to determine if there was a sufficient factual basis for a self-defense claim. Counsel also wanted to be able to advise his client and give him an opportunity to decide whether to testify.

Hawkins testified that both Thorn and Chelly were shot accidently, claiming he did not aim or intentionally fire the weapon. Defense counsel conceded that Hawkins's testimony did not support instructions on justifiable homicide (self-defense); instead, he offered an instruction on excusable homicide (accidental death).

The jury found Hawkins guilty on all charges. At sentencing, the trial court reviewed Hawkins's prior convictions for custodial interference and burglary for the purposes of calculating his offender score. In the prior incident, Hawkins entered Levingston's residence through a bedroom window. While Levingston called 911, Hawkins took their daughter and left the house. The trial judge acknowledged the anti-merger statute, but ruled that the two acts were "distinctly different conducts." 6 Report of Proceedings (RP) at 844. Thus, the court counted the burglary and custodial convictions separately in calculating Hawkins's offender score. The trial court sentenced Hawkins to 391 months' confinement and community custody.

ANALYSIS

I. Ineffective Assistance of Counsel

Hawkins contends that his counsel ineffectively represented him by failing to properly

cross-examine the medical examiner and failing to reasonably investigate his best defense.

A claim that counsel ineffectively represented the defendant is a mix of law and fact, which we review de novo. *State v. Thach*, 126 Wn. App. 297, 319, 106 P.3d 782 (2005). Both the federal and state constitutions guarantee a defendant effective legal representation. *See* U.S. Const. amend VI; Wash. Const. art. I, § 22. To establish that counsel was ineffective, the defendant must show that (1) counsel's representation was deficient and (2) the deficient representation prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Brockob*, 159 Wn.2d 311, 344-45, 150 P.3d 59 (2006). Counsel's performance is deficient when it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 688, 705, 940 P.2d 1239 (1997). Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the trial outcome would have been different. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). We presume that defense counsel was effective, a presumption the defendant can overcome only by showing the absence of a legitimate strategic or tactical basis for the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995).

A. Cross Examination

Hawkins faults his counsel for not questioning the medical expert about whether Thorn's conduct after he was shot may have contributed to his death. Hawkins avers that even if the jury believed he shot Thorn, a thorough cross-examination of the medical examiner would have raised a reasonable doubt as to whether the assault caused Thorn's death.

i. Deficient Performance

The scope of cross-examination is generally a matter of judgment and strategy. *State v. Johnston*, 143 Wn. App. 1, 20, 177 P.3d 1127 (2007). Even a minimal cross-examination will seldom, if ever, amount to a Sixth Amendment violation. *In re Pirtle*, 136 Wn.2d at 489.

During the medical examiner's cross-examination, Hawkins's counsel sought to confirm that the gunshot wound was consistent with "two people . . . struggling over a firearm when it went off." 4 RP at 612. Clearly counsel was seeking support for Hawkins's justifiable or excusable homicide defense. *See State v. Bowerman*, 115 Wn.2d 794, 808-09, 802 P.2d 116 (1990) (finding that a challenged cross-examination was reasonable when it sought to corroborate counsel's defense theory). Hawkins does not overcome the presumption that counsel had legitimate tactical reasons to limit his cross-examination of the expert, thereby denying the witness any opportunity to emphasize his opinion that Hawkins's gunshot caused Thorn's death.

ii. Prejudice

To establish prejudice for failure to effectively cross-examine a witness, a defendant must show that the testimony that would have been elicited on cross-examination could have changed the trial result. *Johnston*, 143 Wn. App. at 20. Even if we assume that counsel should have cross-examined the medical examiner more thoroughly, Hawkins has not shown that counsel would have elicited evidence helpful to the defense. Although the medical examiner acknowledged other medical issues at the time of death—a fracture in the right hyoid bone, swelling of the brain, and obesity—he stated there was "no doubt at all" in his mind that the gunshot caused Thorn's death. Thus, Hawkins has also not shown prejudice.

B. Improper Investigation and Jury Instructions

Hawkins next maintains that his counsel failed to thoroughly investigate his best defense. And because of this failure, according to Hawkins, counsel asserted a defense not supported by the evidence. Hawkins reasons that by arguing justifiable homicide as a defense to the jury during opening arguments and then requesting a jury instruction on excusable homicide, counsel critically damaged his credibility. Hawkins concedes that counsel appropriately changed his defense in light of the insufficient evidence for a jury instruction on justifiable homicide. Hawkins's argument, therefore, is not that the request for a jury instruction on excusable homicide lacked a tactical or strategic basis; rather, counsel's representation was ineffective because he was unprepared and failed to investigate the appropriate defense.

To provide constitutionally adequate assistance, counsel must, at a minimum, conduct a reasonable investigation so that counsel can make informed decisions about how best to represent the client. *In re Pers. Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). The duty to investigate does not necessarily require that every conceivable witness be interviewed, but defense counsel is obligated to provide factual support for a defense where it is available. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 739, 101 P.3d 1 (2004). We consider the defendant's own statements or conduct in evaluating whether counsel acted reasonably; the need for further investigation may be diminished or eliminated based on what the defendant has said. *Strickland*, 466 U.S.at 691.

Hawkins is unable to support his contention that defense counsel's investigation was deficient. To the contrary, the record shows the trial court judge denied Hawkins's request for

new counsel on the grounds that defense counsel had followed the appropriate guidelines and used the investigator and other resources through the Department of Assigned Counsel. The record further establishes that the defense investigator provided counsel with a statement from Levingston that suggested she would corroborate Hawkins's self-defense claim by testifying that Thorn had a handgun in the front seat of his car on the day in question. Counsel reasonably relied on this statement in preparing the case, especially given that the record shows Hawkins informed counsel that he, at least initially, wanted to claim self-defense. Counsel also had no way of knowing that Levingston would renege on her statement during her testimony, or that she would be successfully impeached on several facts important to the self-defense claim. Thus, counsel reasonably pursued investigative leads and legal claims based on the information available to him at the time. Hawkins has failed to demonstrate that counsel's representation was deficient.

Even if we consider counsel's investigation deficient, Hawkins has not shown prejudice. Hawkins has not provided us with transcripts of the opening statements, rendering it impossible for us to gauge the extent to which defense counsel committed to a self-defense claim in opening arguments. Thus, we cannot measure the extent to which counsel's opening statement differed from the evidence, particularly Hawkins's testimony and any possible damage to his credibility.

II. Offender Score

Hawkins argues that the trial court miscalculated his offender score because the incidents of burglary and custodial interference constituted the same criminal conduct. He reasons that although the burglary anti-merger statute permits a sentencing judge to treat separately a crime committed during the burglary and the burglary itself, the court did not exercise its discretion

under this statute. Thus, contends Hawkins, we must remand for resentencing.

But we can affirm a trial court on any basis, and the anti-merger statute would have allowed the trial court to reach the same conclusion it reached after analyzing whether the conduct of the two crimes was the same. *Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986). Accordingly, the error, if any, in the trial court's analysis is harmless.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Hunt, J.

Penoyar, A.C.J.